



2023 PUBLIC-PRIVATE PARTNERSHIP TRENDS REPORT

March 2023

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2022 PROJECT COHORT

The following projects reached financial close between January 1, 2022, and December 31, 2022, and all were included for consideration in our research for this report.¹

- 1

Alachua County, Florida Indoor Sports Facility
Alachua County, FL
- 2

Hillman Parking Garage and City Dock
Annapolis, MD
- 3

Eastern Michigan University Student Housing
Ypsilanti, MI
- 4

George Mason Univ. Digital Innovation Center
Arlington, VA
- 5

I-285/I-20 East Interchange
DeKalb County, GA
- 6

I-495 Express Lanes Northern Extension
Fairfax County, VA
- 7

John F. Kennedy Airport Terminal 1
New York, NY
- 8

John F. Kennedy Airport Terminals 6/7
New York, NY
- 9

LSU Central Utility Plant
Baton Rouge, LA
- 10

LSU Health Sciences Center Student Housing
New Orleans, LA
- 11

Maryland Purple Line
Bethesda, MD
- 12

Clackamas County Courthouse
Oregon City, OR
- 13

Pennsylvania Bridge Program²
Harrisburg, PA
- 14

University of Maine Redevelopment
Orono, ME
- 15

University of Mass. Amherst Student Housing
Amherst, MA
- 16

Washington Smart Street Lighting Project
Washington, DC

¹The project numbers above correspond to the numbers plotted on the map found on page 9.

²Originally, the Pennsylvania Bridge Program was the aggregation of nine major bridge reconstruction and rehabilitation projects throughout the state. In September 2022, the Pennsylvania Department of Transportation announced only six of the nine projects will move forward.

METHODOLOGY & OVERVIEW

Welcome to our sixth-annual Public-Private Partnership Trends Report. Over this time, we have reviewed documentation for over 100 U.S. greenfield P3 project agreements and have provided insights on what we discover, augmented by research into data drawn from multiple sources, both public and proprietary, as well as our own experience as legal practitioners assisting clients with P3 projects across the country.

Last year, we wrote that “2021 will come to be seen as an inflection point for infrastructure projects in the U.S.,” and in many respects, this proved to be accurate. The Infrastructure Investment & Jobs Act (IIJA), signed into law in November 2021, is beginning to have a measurable impact on every phase of project delivery. Its largely positive effects helped counteract some worrisome macroeconomic trends, including the appearance of generationally high inflation and turbulence in the equity and credit markets. Lingerin supply chain challenges and widespread labor shortages also present an additional layer of concern for project owners, contractors, and investors. Despite these concerns—or perhaps, because of them—P3 models for project delivery continue to attract interest.

As infrastructure evolves, so too does P3. Industry participants land on newer approaches to project delivery, such as process refinements at all phases in order to manage inflation risk and novel reallocations of project risk between public and private partners. Our report attempts to capture some of these developments, while providing a framework for looking at the future. We hope you find our 2023 Public-Private Partnership Trends Report helpful in contemplating what is possible through P3s at this crucial time when the spotlight is squarely on rethinking and rebuilding American infrastructure.

THE YEAR IN P3

The Infrastructure Investment and Jobs Act (IIJA) was signed into law in November 2021 amid much fanfare and optimism that the law’s approximately \$550 billion in new spending directed to infrastructure could spark a much-needed wave of activity across multiple project types.

This past year was remarkable on many different levels but was chiefly characterized by persistent supply chain worries, a turning credit market cycle, labor and materials shortages, rampant inflation, and geopolitical turmoil.

All of this exacerbated a rout in the bond market that constrained issuances and sent yields soaring. According to a report published by *The Bond Buyer* magazine, municipal bond issuances fell more than 20% year over year by volume, and institutional investors fled the market, pulling more than \$100 billion out of municipal bond mutual funds. Economists expect some of these tensions to ease in 2023, but their impacts were broadly felt by both public and private entities involved in P3 projects, as project sponsors and their private partners consistently noted macroeconomic risks at the top of their list of worries, notwithstanding enactment of the IIJA.

Nevertheless, major infrastructure projects moved ahead at a clip that generally exceeded many other forms of construction activity. Construction starts for power plants and the telecommunications grid exploded higher in 2022, posting a 27 percent year-over-year increase, according to Dodge Data & Analytics. Similarly, highways and bridges (23 percent) and educational buildings (eight percent) also experienced a bump in new construction, and each of these categories are projected to see increases in 2023 as well.

CONSTRUCTION STARTS FOR SELECTED PROJECT CATEGORIES*

	2021	2022	FORECAST 2023	% CHG. '21-'22	% CHG. '22-'23
EDUCATIONAL BUILDINGS	63.5	69.0	72.7	+8.7	+5.4
HIGHWAYS & BRIDGES	81.9	100.8	121.0	+23.1	+20
ENVIRONMENTAL PUBLIC WORKS	54.1	60.1	68.8	+11.1	+14.5
OTHER NON-BUILDING	27.7	29.7	35.0	+7.2	+17.8
POWER PLANTS/GAS/COMMUNICATIONS	41.2	52.5	56.4	+27.4	+7.4
TOTAL CONSTRUCTION	928.2	1,085.9	1,083.5	+17.1	-0.2

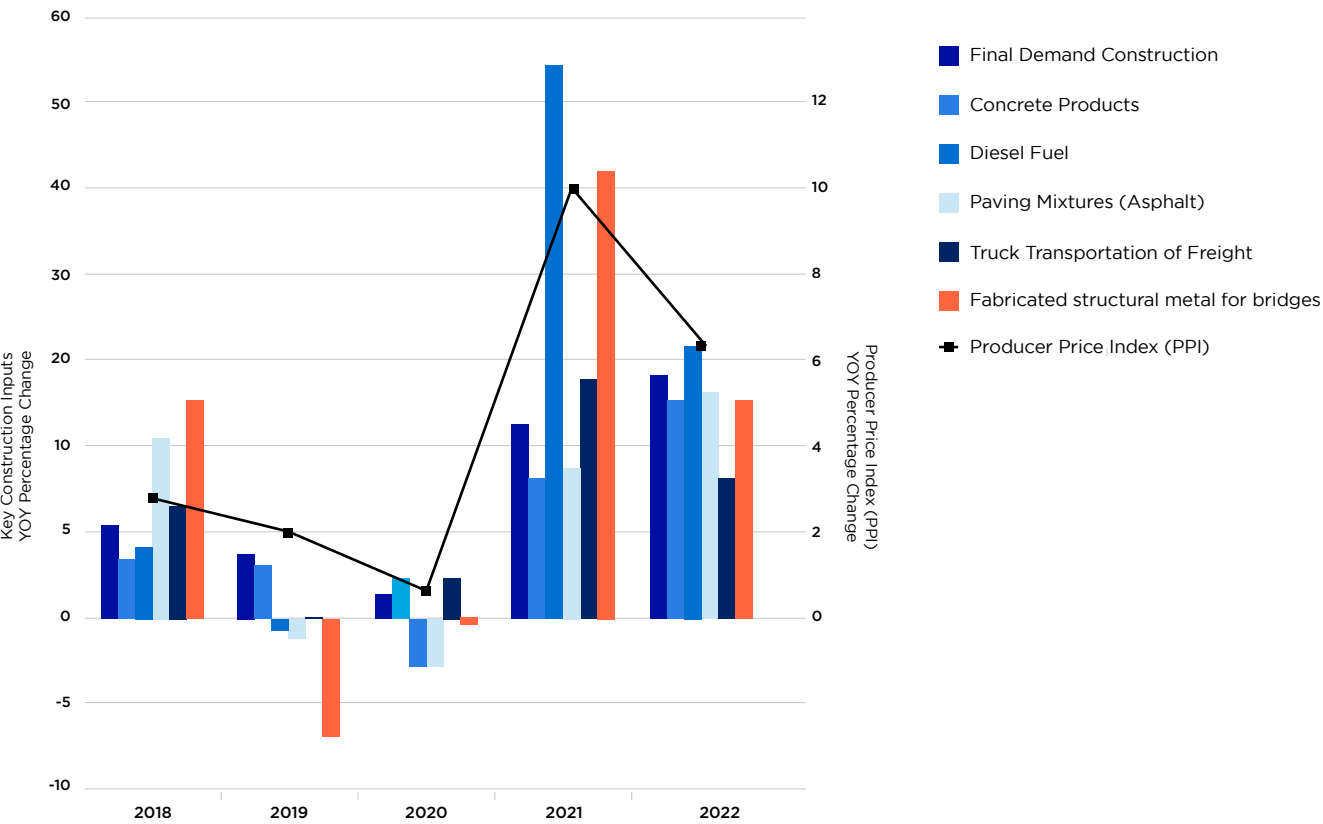
*in billions of U.S. dollars

SOURCE: DODGE DATA & ANALYTICS

In some respects, the mix of economic, financial, and operational concerns have enhanced the appeal of P3 project delivery. Indeed, the Biden administration—in its October 2022 “Action Plan for Accelerating Infrastructure”—specifically called out the use of “alternative delivery approaches” for their potential to reduce lifecycle costs and compress project timelines, citing in particular the U.S. Army Corps of Engineers Civil Works program.

As labor and materials shortages persist and the cost of key construction inputs continues to outpace general price inflation measures, P3 becomes a very attractive option. We may even see greater private equity participation in projects—reversing recent trends—despite the IIJA’s bounty of available funds. Private investment’s higher cost of money may have led project owners in the recent past to eschew private equity; however, the calculus has shifted. Those added costs are well worth it if private business partners can deliver projects faster, thus avoiding the uncertainty associated with all the challenges described above, especially rising costs.

ANNUAL PERCENTAGE CHANGE IN THE COST OF KEY CONSTRUCTION INPUTS



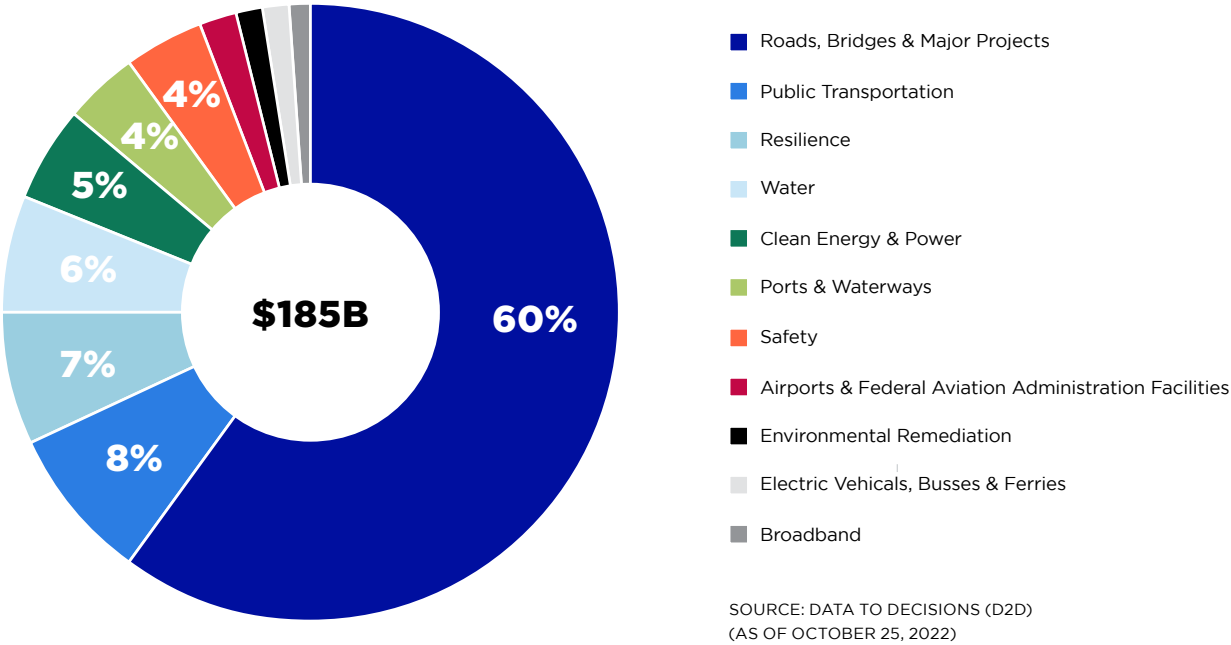
SOURCE: AGC OF AMERICA

FEDERAL INFRASTRUCTURE SPENDING: EARLY IMPACT

Despite macroeconomic headwinds, the IIJA has helped launch multiple infrastructure projects across the country. As we approach a fuller implementation of the law, we should see even more throughout the next few years.

Most of the IIJA spending has been seen in the area of surface transportation, with over two-thirds of the \$185 billion (as of late 2022) allocated to roads, bridges, and mass transit. This is to be expected, as roughly half of the above-baseline spending in the IIJA was initially targeted at transportation projects.

ANNOUNCED INFRASTRUCTURE INVESTMENT & JOBS ACT FUNDING BY SPENDING AREA (%)



The lack of spending to date on so-called next generation projects—that is, digital infrastructure, broadband, clean energy and smart-grid technologies—has been conspicuous, especially so given the broader media attention on those elements of the IIJA; however, according to a recent report from Global X Funds, “funding for these initiatives will be delivered primarily through competitive grants or by programs that originated with the bill” and could well be expected to proceed on a slower timeline, with the notable exception of electric vehicle (EV) infrastructure projects. IIJA allocated \$5 billion in formula funding (\$7.5 billion total) over five years to build out a national network of EV chargers, and all 50 states have submitted—and the federal government has approved—plans for EV infrastructure. According to Fitch, a rating agency, those states that embraced the P3 delivery model for other projects will likely turn

to P3 for EV infrastructure as well, noting that Texas has no plans for state ownership of EV chargers, while California will use vehicle registration fees, among other sources, to fund construction. We expect to see a variety of proposals forthcoming in 2023 that utilize P3 for EV, where states will experiment with the number of contractors and/or operators, the method of payment (availability versus market-risk), and agreement duration.

Two Steps Forward...

The competitive grant process is only one area that could slow down the implementation of IIJA. There are still notable scarcities in the infrastructure supply chain, especially labor. Labor shortages are often thought of in the context of the construction phase. We experienced record-high levels of construction job openings in 2022—well over 400,000—and according to a March 2022 article from McKinsey & Co., the IIJA is expected to create demand for another 300,000 to 600,000 positions annually.

This difficult circumstance notwithstanding, the scarcity of labor extends beyond construction into all project phases. In a recent survey of banking leaders published by consulting and accounting firm Wipfli LLP, 53 percent of respondents identified labor shortages as having a major impact on operations. Furthermore, it is the mission-critical jobs that are experiencing the greatest degree of scarcity—front-line operations in retail and commercial banking. These shortages—in concert with labor-pool constraints on the government side—could lead to bottlenecks in the management of funds and projects.

Further complicating existing materials and labor shortages are the raft of provisions in the IIJA that aim to support labor and U.S. manufacturing. Many projects funded in whole or in part by the IIJA carry with them Davis-Bacon Act (DBA) requirements in connection with prevailing wages and strict recordkeeping, which will necessarily inflate project costs. The DBA requirements coincide with a push by the Biden administration to change the DBA itself, as the Department of Labor has proposed the most meaningful reform of these regulations since the Reagan administration.

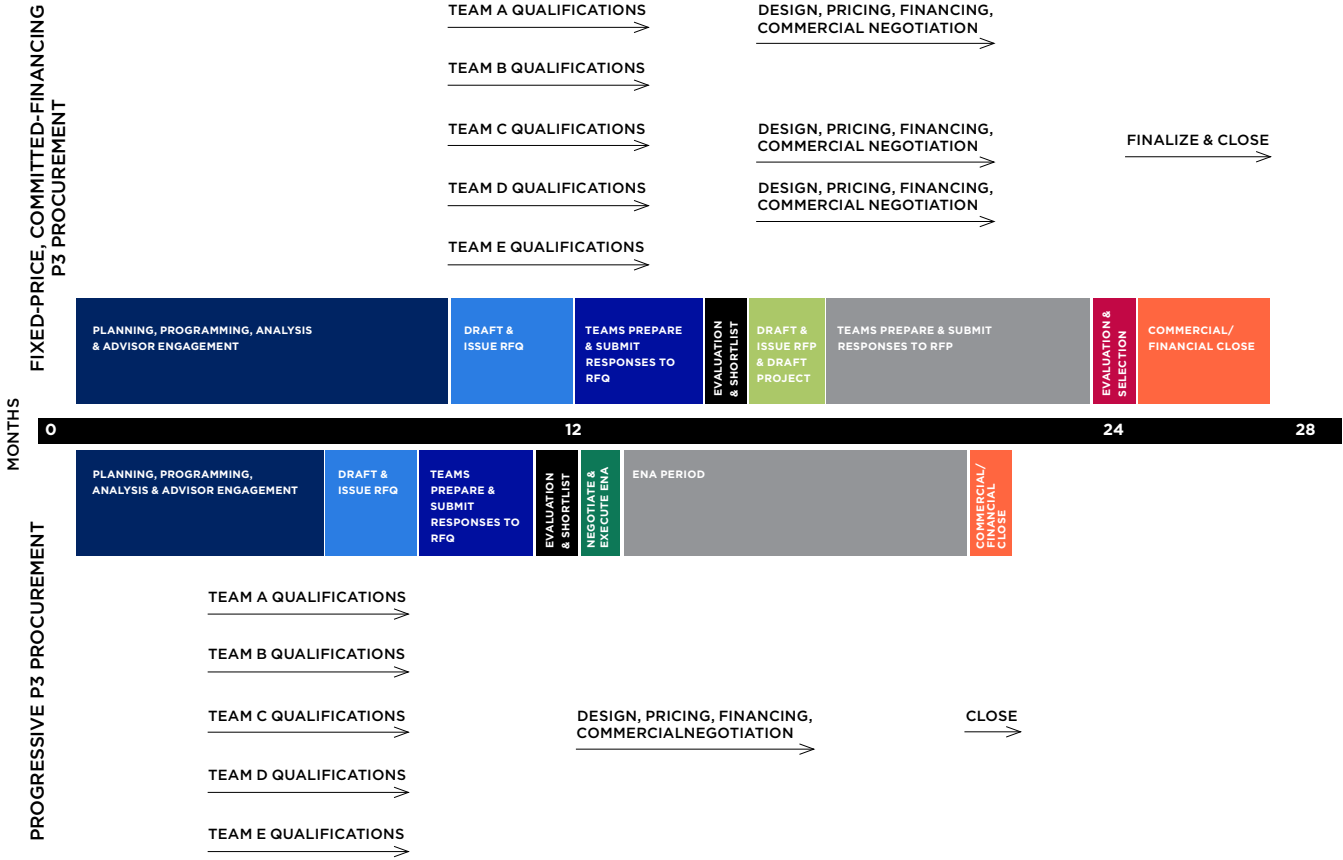
Additionally, the “Buy American” provisions found in Title IX of the IIJA set forth requirements for iron and steel products, manufactures, and construction materials. While these requirements only apply in the context of government procurement, it is easy to imagine how such regulations could complicate existing supply chain dislocations, especially given the immense range of projects envisioned under IIJA, including EV charging stations, broadband infrastructure, and environmental remediation—areas that historically have relied on significant quantities of inputs sourced from abroad.

THE RISE OF HYBRID & PROGRESSIVE P3

As the P3 model has evolved in the U.S., both public and private partners have expressed dissatisfaction with some of the model's risk-sharing mechanisms, leading to new and innovative applications of P3 principles.

For a long time, fixed-price, committed-financing procurement with a significant private equity component was the dominant model for P3 projects in the U.S., but as the scope of P3 projects has widened beyond surface transportation and into higher education, social infrastructure, and next-generation technologies, the traditional model has struggled to accommodate the needs of public and private participants at each project phase. Hybrid and progressive P3s attempt to rebalance risk and introduce greater efficiencies in the procurement process, speeding up project delivery and providing greater flexibility regarding the project's capital stack.

TIMELINES FOR TRADITIONAL P3 & PROGRESSIVE P3 PROCUREMENT

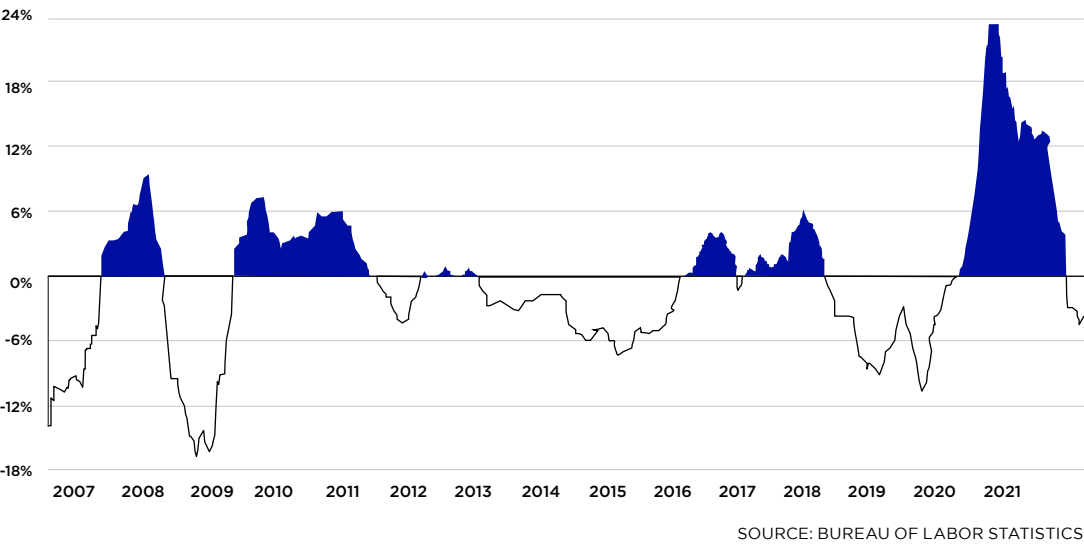


SOURCE: "IMPROVING P3 PROCUREMENT THROUGH A PROGRESSIVE MODEL," P3 HIGHER ED RESOURCE CENTER, JULY 24, 2020.

The primary innovation with progressive P3s is how they compress the timeline for the evaluation and selection of the project team by stacking the design-build, pricing, and financing diligence in an exercise that runs concurrently, often by partners on the same project team. The grantor will often select a team based on qualifications and then jointly develop the P3 agreement in an iterative and dynamic process.

Given the volatile nature of material costs since the onset of the Covid-19 pandemic, it is easy to see the advantages of this approach when looking at the spread between material costs and project bids (see chart below). The economics of fixed-price, committed-financing projects have been hampered—almost on a week-to-week basis—by the vast run-up in project costs, which in turn introduced severe strains on the component agreements of P3 deals.

YEAR-OVER-YEAR CHANGE IN MATERIAL COSTS VS. BID PRICES, JANUARY 2007 TO OCTOBER 2022



SOURCE: BUREAU OF LABOR STATISTICS

By contrast, progressive P3s were able to flex as needed to allow for a more equitable distribution of risk in the negotiation phase, particularly when paired with financing options—like the utilization of conduit financing—that pose less interest-rate risk or that have a lower cost of money.

RECENT PROGRESSIVE P3 SUCCESS STORIES*

University of Kansas Central District Lawrence, KS	Travis County Civil and Family Courts Facility Austin, TX
The project utilized an interim agreement with a private consortium to finalize the program, advance design, and reach commercial and financial close in January 2016, within seven months of selection. The \$383 million project delivered two months ahead of schedule and includes a 285,000-square-foot integrated science facility, 26,500-square-foot student union, 1,250 beds of student housing in three buildings, dining center, athletic fields, and 2,000 parking spaces, as well as a central utility plant and all utility and transportation infrastructure.	The project adopted a progressive process with an exclusive negotiating agreement (ENA) that allowed the county to move the 430,000-square-foot, \$344 million courthouse project from selection of a consortium to financial close in nine months. Design, pricing, and contractual terms were collaboratively advanced—and ultimately finalized—during the ENA period.

*Husch Blackwell served as developer's counsel on these projects.

THE P3 PIPELINE

Despite a massive infusion of cash from Washington, this past year witnessed a difficult and unpredictable operating environment for P3 agreements, as interest rates soared, inflation remained high, and material/ labor scarcity hampered planning.

Although 2021 saw a record number of P3 projects reach financial close, the pace had already started to slow at year’s end. The fourth quarter of 2021 only saw four projects reach a close, and that established the pace for the entirety of 2022, which posted the fewest P3 financial closings since 2018. The project values of P3 deals reaching a close in 2022, however, easily eclipsed the previous year’s total of \$6.2 billion, owing largely to the multi-terminal redevelopment at John F. Kennedy Airport in New York.

U.S. P3 PROJECTS REACHING FINANCIAL CLOSE, 2020-21

2020



2021



2022



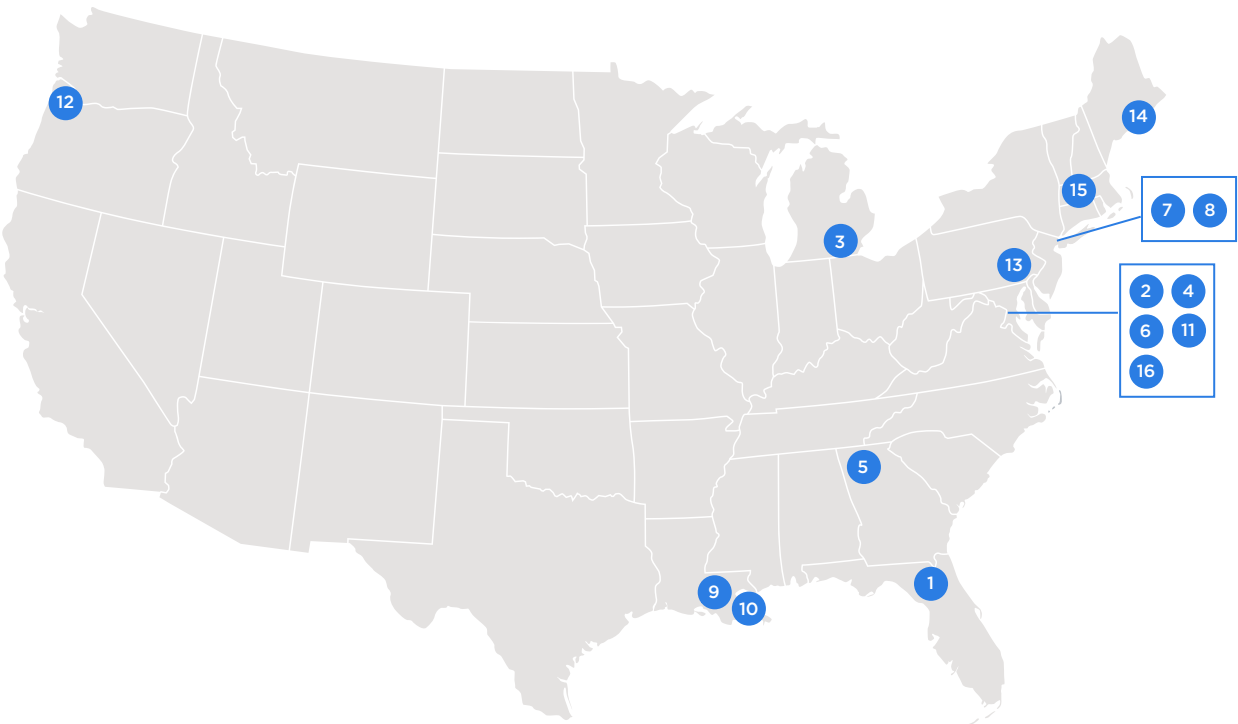
SOURCE: INFRAMATION

GRANTORS REACHING FINANCIAL CLOSE IN 2022

- Alachua County, Florida
- City of Annapolis, Maryland
- Clackamas County, Oregon
- Eastern Michigan University
- George Mason University
- Georgia Department of Transportation
- Louisiana State University
- University of Maine System
- Maryland Department of Transportation
- University of Massachusetts Amherst
- Pennsylvania Department of Transportation
- Port Authority of New York and New Jersey
- Tulane University
- Virginia Department of Transportation
- Washington DC Office of Public-Private Partnerships

The bipartisan infrastructure law has led many to view the P3 pipeline with greater optimism for 2023, and there are encouraging signs that some of the bump in spending will flow toward P3 projects. According to the American Road & Transportation Builders Association (ARTBA), last year saw 29,000 active highway and bridge projects, a nine percent annual increase. Likewise, ARTBA anticipates that transportation construction work will grow to \$172.3 billion in 2023, up from \$155.4 billion in 2022, some of which should take the form of a P3 or progressive P3 structure.

LOCATION OF 2022 P3 PROJECTS REACHING FINANCIAL CLOSE



The recent policy focus on infrastructure has also filled the P3 pipeline with projects from grantors making their first forays into P3. In 2021, it was the U.S. Army Corps of Engineers (USACE) that closed financing on a \$2.75 billion flood diversion project for the Red River in North Dakota and Minnesota, the first such P3 in North America; last year, the District of Columbia ventured into P3 with a street lighting project. This coming year we could well see New York’s Metropolitan Transportation Authority, the largest transit agency in the U.S., close on its first P3 deal in a project that involves the installation and rehabilitation of elevators at 13 subway stations. We anticipate more first-time grantors in the P3 space helping to bolster the pipeline of P3 projects, especially as more states authorize P3s through legislative initiatives.

Despite this, challenges remain. One of the lingering drags on P3 has been the financial strength of many states and localities that have seen their coffers bulge due to record tax revenues and federal stimulus, lessening the need for private finance. In some cases, governments have eschewed debt altogether, spending cash on capital projects. The windfall, however, could be drawing to an end. According to the National Association of State Budget Officers, states’ rainy-day fund balances grew 58% in fiscal 2021, a figure that is likely to decrease amid recession fears in the U.S.

Even against the backdrop of the states’ strong fiscal condition, the P3 procurement methodology has a lot to offer, and we anticipate a rebound throughout 2023 for the P3 pipeline, if inflation can be tamed and shortages of labor and material are resolved. Capital is not so much the challenge for infrastructure today; putting together talented teams across all project phases who can deliver high-quality results is a far more pressing issue, and it’s one that P3 can help to solve.

P3 LEGAL ISSUES & TRENDS

Public-private partnerships attempt to strike a delicate balance over a long period of time, often several decades. Success in the long run depends on how well the initial agreement addresses potential project risks. Below, we explore some of the emergent trends in recent P3 agreements that grantors and private businesses need to consider.

Inflation Risk

Towards the end of the pandemic, inflation emerged as an important risk factor for the first time in a generation. While the rate of inflation has somewhat slowed, P3 agreements have increasingly utilized provisions relating to inflation risk. One method has been to tie financial components of these agreements to some measure based on the Consumer Price Index (CPI). For instance, the Pennsylvania Major Bridge Program used a regional CPI for urban consumers to establish an inflation “Indexation Factor” based on the CPI on the date the deal was entered, divided by the CPI on the substantial completion date of the project. The Indexation Factor was then included in formulas for several financial obligation calculations, including escalations to benchmarked insurance costs from period to period.

In some other cases, P3 agreements are preemptively excluding the impacts inflation might have on the agreement. In the case of the Washington, D.C. Street Light Modernization P3, the agreement specifically excludes changes in inflation from being taken into account as a relevant event justifying an adjustment to its Base Case Financial Model.

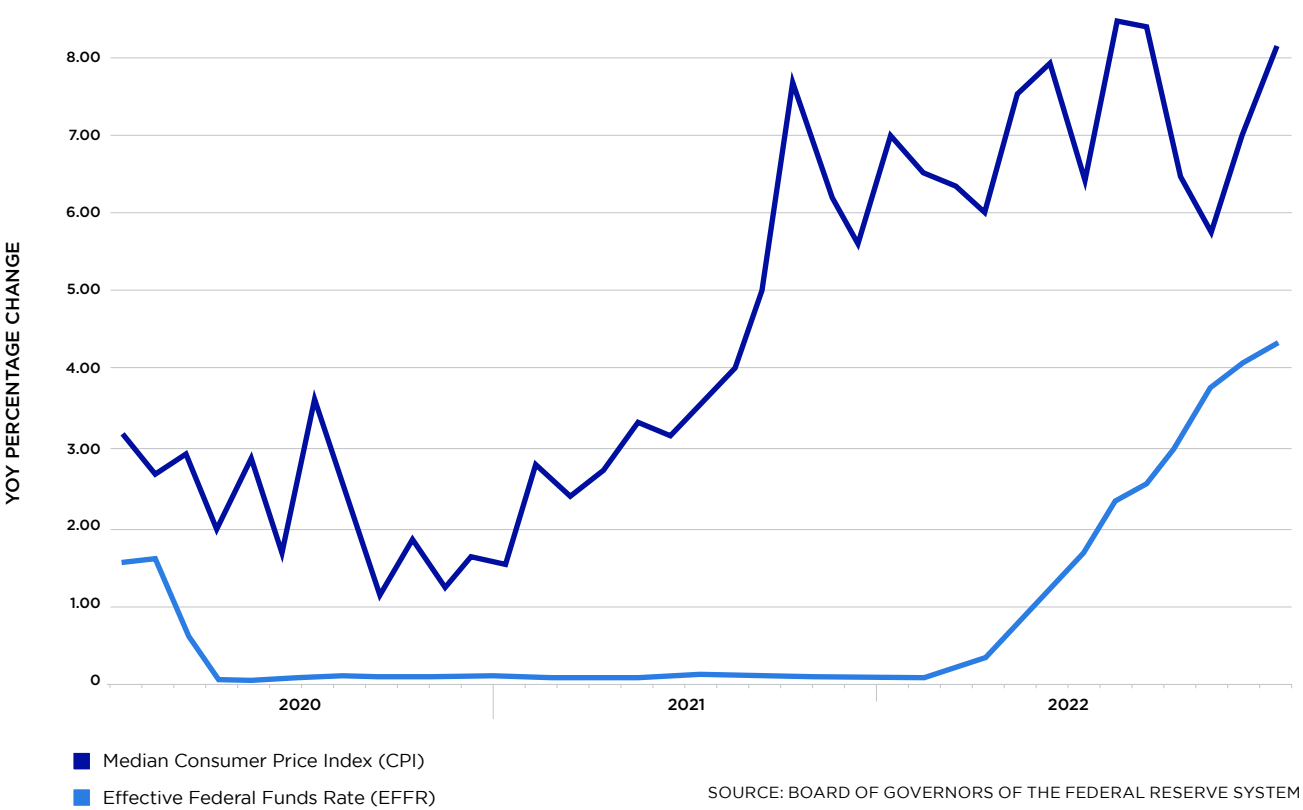
Interest Rate Risk

With the recent interest rate increases, negotiating the risk of increasing rates is important to most P3 agreements. Historically, in P3 agreements, grantors have frequently assumed the interest rate risk between the benchmark rates and base rate at financial close for a specified period (the interest rate protection period), though the approach varies from project to project. This practice provides the concessionaire an incentive to achieve financial close before the date the interest rate risk transfers to the concessionaire. If interest rates increase during the interest rate protection period, the grantor will be responsible for any increased costs to the developer resulting from the increase.

In the case of the Washington, D.C. Street Light Modernization P3, the District reserves the right to approve any changes in Base Interest Rates that differ from the interest rate in the preliminary financial model. In that agreement, the District bears the risk and has the benefit of one hundred percent of the impact (either positive or negative) on the “Base Maximum Available Payment” of changes in any Base Interest Rate for the period beginning on the Interest Rate Protection Start Date and ending on the earliest of either a “Bank Debt Rate Protection Period” or “Bond Rate Protection Period.”

Similarly, in the Georgia Department of Transportation I-285 and I-20 East Interchange P3 agreement, the State and Road Authority bears the risk and has the benefit of changes in benchmark interest rates underlying financing contained in the Financial Plan and the Preliminary Financial Model for the interest rate protection period. The agreement stipulated that the Preliminary Financial Model would then be updated along with the Maximum Available Funds for a given fiscal year depending on whether the interest rate increased or decreased during the interest rate protection period. However, that agreement also requires the parties to work together to find alternative financing if interest rates do increase.

INFLATION STILL OUTPACING INTEREST RATES



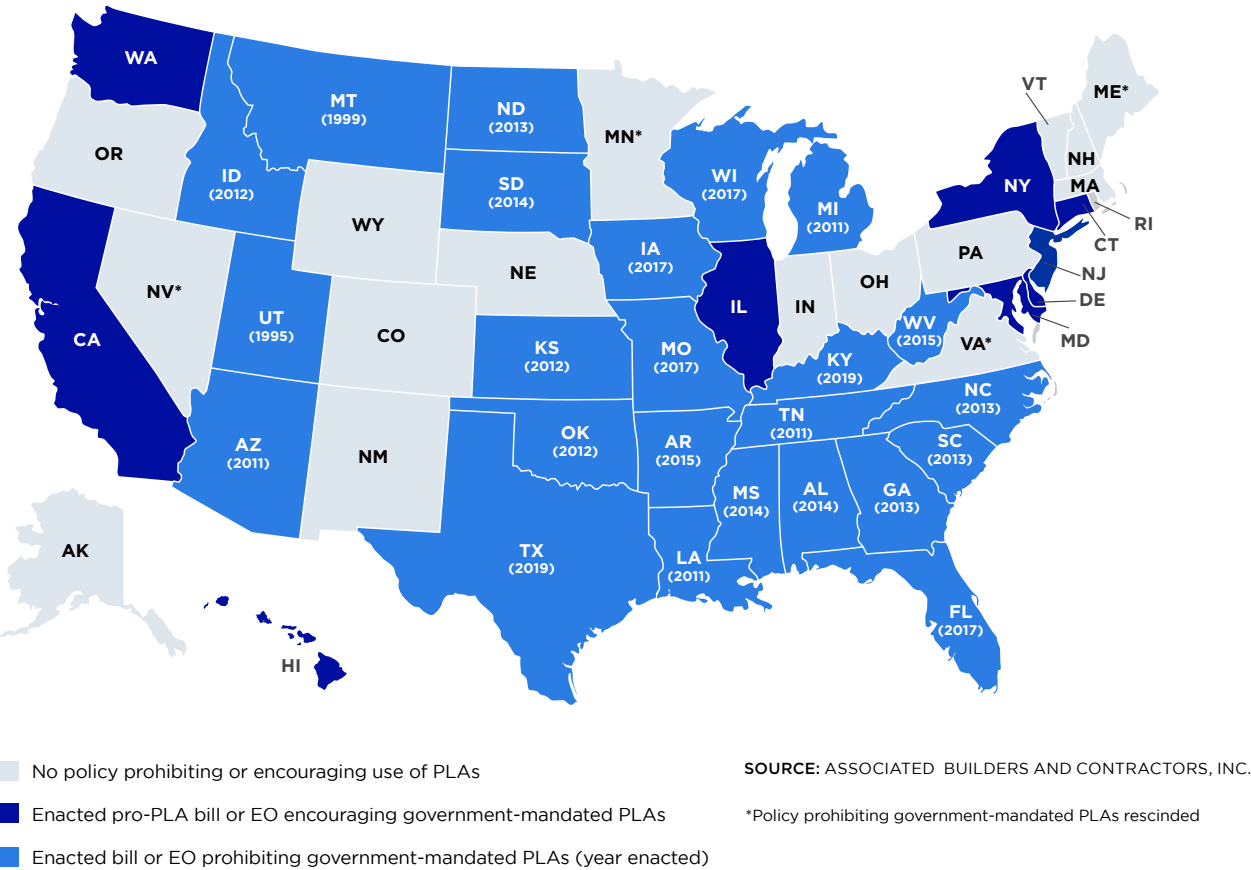
Project Labor Agreements

A project labor agreement (PLA), also known as a community workforce agreement, is a pre-hiring agreement negotiated by unions and contractors to set terms and conditions of employment. PLAs will often include dispute resolution procedures and no-strike provisions, as well as timing and budget provisions. While they are not always used in P3s, PLAs are common, especially in states and cities requiring or encouraging them, which will often require them as part of a broader community benefits program.

Additionally, PLAs can serve to streamline the negotiation process and ensure project delivery, especially among union workers, though there is some criticism that PLAs can be anti-competitive and discourage non-union workers from bidding and working on projects, in turn potentially raising project costs. With many states in recent years banning their state agencies from requiring PLAs, P3 project managers should also be mindful of these countervailing balances when deciding whether to utilize a PLA in their project. More P3 agreements seem to be handling the roles that a stand-alone PLA might otherwise.

For example, while the state of Pennsylvania has no PLA legislation and the Pennsylvania Major Bridge P3 does not utilize a standalone PLA, the contract sets out contracting and labor practices and sets a minimum wage standard to be increased by annual cost-of-living adjustments using a CPI-U index for All Urban Consumers for Pennsylvania, New Jersey, Delaware, and Maryland. Further, that agreement also establishes an obligation for the development entity to ensure labor harmony, including taking necessary steps to prevent strikes, work stoppages, and work slowdowns due to labor disputes or other labor related matters. The Washington, D.C. Street Light Modernization P3 contract also sets out labor position classifications and wage rates per each classification, and it establishes a “Wage and Hour Administrator” to settle disputes where laborers and the contracting officer do not agree on a proposed classification and wage.

STATE-BY-STATE STATUS OF PROJECT LABOR AGREEMENT MANDATES



At the federal level, a recently issued executive order requires that all large-scale federal projects (with a total estimated cost of \$35 million or more) use PLAs, unless exempted. While the actual provisions allowed or required in a PLA generally depend on the regulating government agency, it is common that these agreements bind all contractors and subcontractors who successfully bid on the project, even if that means superseding other existing collective bargaining agreements. Additionally, these agreements will generally touch on productivity, quality of work, safety, and health standards applicable to the project. All of this needs to be carefully considered in light of greater federal participation in P3s as well as the recently passed infrastructure law.

Community Benefits Agreements

A community benefits agreement (CBA), while voluntary for developers, is a tool being used by governments and communities looking to build sustained benefits in exchange for hosting a P3 project. While developers entering a CBA are legally bound to the agreement, so too are the community coalitions that generally offer public approval or acquiescence and the state or local governments that offer tax abatements, subsidies, or entitlements in exchange for agreed-upon community benefits. As more P3s enter CBAs, those that do not may face increased community pushback in the absence of negotiated community benefits. The most common CBA commitments for developers are typically monetary but can also include non-monetary benefits, such as establishing community facilities and services, agreements to pay workers a living wage, legal assistance, or affordable housing units, among others. For example,

in the case of the Alachua County, Florida multi-purpose sports venue P3, an affiliate of the developer/operator donated the land to the County as part of a separate Donation Agreement. Or in the case of the Maryland Purple Line P3 agreement, one requirement was a community workforce job center opened in Prince George’s County, Maryland for people seeking jobs related to the P3. The Purple Line P3 also requires good-faith efforts be made to establish specific workforce goals, namely, at least 10 percent of all construction work be performed by “Nationally Targeted Workers of Social Disadvantage” and that not less than 33 percent of all construction work be performed by “Nationally Targeted Workers” (either “Nationally Targeted Workers of Social Disadvantage” or “Nationally Targeted Workers of Economic Disadvantage”). It also requires related reporting, such as hours performed by positions, the number of hires and their “Nationally Targeted Workers” designation, wages paid, and any terminations, among other information.

Diversity

Government contracts continue to put a focus on promoting diversity in procurement, emphasizing the public’s enduring commitment to policies that ensure minority-owned, women-owned, disadvantaged, and small businesses have a fair opportunity to compete for contracts. These provisions typically require private partners, general contractors, and their subcontractors to comply with certain participation goals so that all vendors can compete equally for contracts and subcontracts relating to a project’s construction, procurement, operations, and management. P3 agreements usually set out these requirements in either a Disadvantaged Business Enterprise (DBE) or a Small Contractor Set Aside (SCSA) provision.

While these provisions have appeared in public-private partnerships for a while, the trend toward including participation goals has continued to increase. For example, the Washington Smart Street Lighting Project agreement provided for a 19 percent DBE participation goal, going a step further and requiring the developer to implement D.C.’s DBE Program Requirements in each of its subcontracts. Similarly, the private partner in the Maryland Purple Line Light Rail Project agreed to a lofty participation goal of 26% for design services and a 22% participation goal for construction services. While these provisions have become standard, private partners can expect these participation goals to continue to increase.

Changes in Law

P3 agreements typically require each party and their subcontractors to comply with applicable law during the agreement term. Oftentimes, parties anticipate a change in law to transpire while the agreement is in effect and allocate risk accordingly. Traditionally, the private partner has borne the financial risk of such changes. Recently, however, these provisions have become more developer friendly. For instance, in both the Pennsylvania Major Bridge Program and the Georgia East Interchange Project, the financial risk for a change in law shifted to the public partner. Demonstrating Covid-19’s lingering effects on government contracts, the Pennsylvania Major Bridge Program agreement carved out an exception for such changes in law to exclude “pandemic” events.

Change in Control

Given the risks associated with the lengthy development phase of many P3s, governmental entities typically limit their private partners’ ability to change control during this phase. A representative example of such a limitation can be found in the Alachua County Sports Venue project, which prohibits the developer from assigning its obligations during development unless expressly allowed by the County.

The standard for P3s implementing, a “lock-up” period forbidding a developer to change control remains two years from project completion, as demonstrated by the Pennsylvania Major Bridge Program and Washington D.C. street light modernization project.

A trend has emerged in public contracts requiring similar commitments of governmental entities. Notably, the Georgia East Interchange Project disallowed the public partner from assigning its obligations under the contract, unless assigned to another governmental entity with sources of funding for the project payments that were at least as adequate and secure as the contracting partner’s. As P3s continue to evolve, private partners may continue to see the benefits of including these terms in their projects.

Sustainability/Environmental Standards

Government agencies are increasingly viewing P3 procurement as an effective mechanism to achieve social and sustainability targets. It is commonplace for P3 agreements to specify the environmental requirements for the processes and the outcomes of the project. Often this includes provisions requiring the developer to comply with all applicable environmental laws, create a comprehensive environmental protection plan, and obtain all approvals and requirements required under the National Environmental Policy Act (NEPA). For example, Georgia’s State Road and Tollway Authority required East Interchange Builders, LLC to develop and maintain an “Environmental Management Database” to enable near real-time environmental compliance, tracking, and support performance reporting. The database allows both parties to maintain a comprehensive record of environmental commitments and track compliance throughout the construction period.

Force Majeure/Delays

In the world of P3 projects, delays are often inevitable and expected. With this in mind, parties generally plan ahead by addressing all predictable circumstances which might potentially affect the completion of the project in the P3 agreements. Following the height of the COVID-19 global pandemic, parties often specifically include epidemics, quarantine regulations, pandemics, and other similar illness-related circumstances in the *force majeure* provisions. Other common *force majeure* delays include material supply chain disruptions, riot and civil commotion, acts of God, and war. Regardless of the reason for a delay, it is crucial that notice of any delay, disruption, or interference be provided to the other parties as soon as reasonably practicable. Remedies available to the parties in the event of a delay vary from agreement to agreement. In the I-285/I-20 East Interchange Project, the developer is given the ability to request the owner accelerate its efforts to attempt to regain lost time after a *force majeure* event, provided that the developer reimburse the owner for any associated costs. As another example of potential remedies, the developer of the Alachua County Multi-Purpose Sports Center is not relieved of its duty to perform nor is the developer eligible for additional compensation from the County due to any delay in the project, even if such delay was caused by the County. This agreement limits the developer’s sole remedy to an extension of the project schedule.

Work Changes

Over the course of a project’s development, it is not unusual for an amendment to the scope of work to become necessary. Commonly referred to as a change order, such material modification of a project’s scope of work requires consent from all parties. When making the request for a change, the party seeking the change is required to provide specific information such as the nature, extent, scope, timing, cost, and

other material details concerning the proposed change. If the parties are unable to agree to a proposed change, the agreements usually call for mediation to occur before parties can resort to litigation. Due to the importance of keeping P3 projects on schedule, agreements address the time frames for resolving change order disputes. The Alachua County Multi-Purpose Sports Center agreement requires mediation to conclude within 120 days of submission to mediation and explicitly states that in the event litigation ensues, such litigation or resulting settlement shall not delay any performance obligations under the agreement.

When a change results in a decrease in the project cost, the parties typically share that benefit, like in the Smart Street Lighting Project Agreement, which specifies the benefit of a decrease in the developer’s cost is to be shared equally between the parties. In contrast, an increase in the project cost is often covered solely by the party seeking the change.

Lender Rights

To provide protection to lenders, P3 agreements include language to restrict the parties’ ability to act in ways which might adversely impact the rights of lenders. Given the amount of money lenders are lending for these projects, lenders expect to be adequately protected, especially in the event of a default. A major concern for lenders is having the right to cure any default which could result in termination of the agreement. Additionally, it is common for lenders to require mortgagors to grant security interest in or assign the mortgagors’ interests to the lenders in order to secure the project debt. Aside from the major lender protections, lenders, like the one in the Smart Street Lighting Project Agreement, also tend to request other favorable language be added to agreements such as removing any cap on the amount of estoppel certificates the lenders are permitted to request.

Refinancing Gains

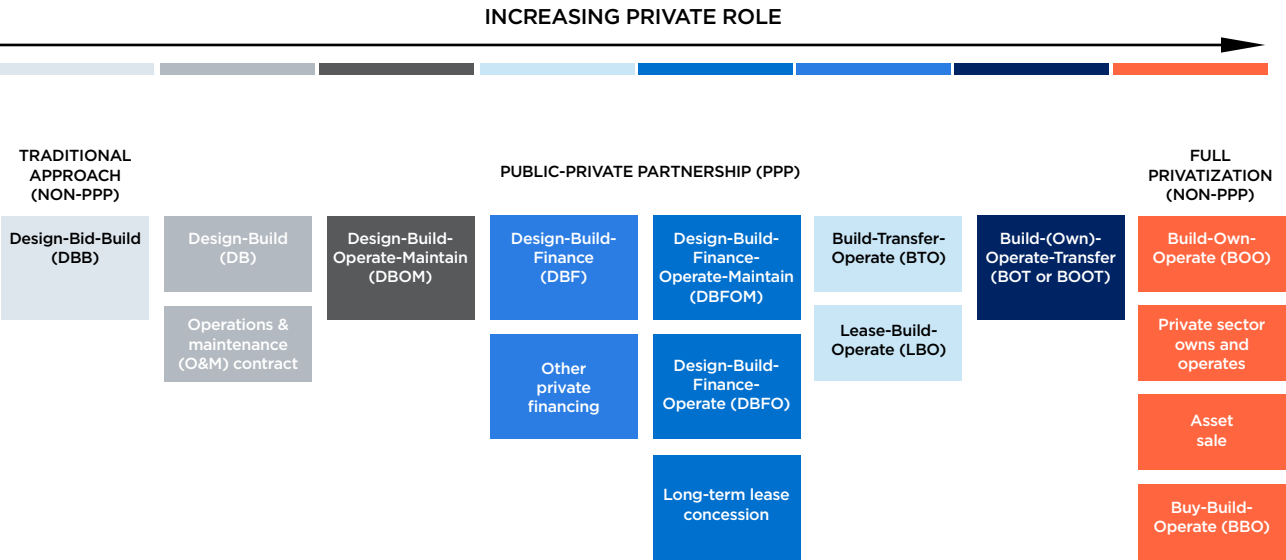
Due to the lengthy and complicated nature of P3 projects, refinancing is frequently necessary. A refinancing gain, as generally described in the I-285/I-20 East Interchange Project, is a decrease in debt service or financing costs net of transaction costs associated with a refinancing. Because the refinancing gains affect all parties, the parties must come to a consensus on the amount and the timing of any refinancing gains. The amounts required to be excluded from the calculation of refinancing gains are outlined in the agreements. The Purple Line Project agreement and the I-285/I-20 East Interchange Project both exclude, among other things, periodic resetting and remarketing of tax exempt or taxable bonds with variable or floating rate interest, and they exclude refinancing that was specifically identified and previously accounted for.

While refinancing gains can be split any way the parties see fit, a 50/50 split is quite common. The actual distribution of the amount gained can occur in a few different methods. As an example, the Penndot Major Bridges Project provides three options: (1) a lump-sum payment; (2) a reduction in availability payments over the remainder or a portion of the project term; or (3) a combination of the first two distribution methods.

THE VARIETIES OF P3

For some industry observers, the finance element is the key defining feature of a P3. Without private debt or equity financing, they argue, there is no P3. Taking that bright-line approach does provide apples-to-apples data sets for analysis; however, viewing P3 in this narrow way misses bigger-picture concepts that are important to delivering projects.

PROJECT DELIVERY MODELS ALONG A CONTINUUM OF PRIVATE SECTOR INVOLVEMENT



SOURCE: NATIONAL CONFERENCE OF STATE LEGISLATURES

In reality, there are exigencies in the procurement process for large infrastructure projects that are hard to capture in a spreadsheet. Some processes begin as P3s and remain as such throughout the timeline; others might end as more traditional design-build procurements; and still others begin as P3s, shift to other models, and then return to P3 due to a variety of circumstances. The lesson is that procurement is a far more fluid process than our models sometimes allow for, and as an approach, P3 is far more robust than simply a financing mechanism, as demonstrated in the graphic above.

ABOUT HUSCH BLACKWELL'S P3 TEAM

Husch Blackwell knows the P3 industry inside and out. We help private businesses and public agencies form partnerships and share the resources, risks and rewards of P3 projects. We guide clients through the negotiations, coordination and closings of contracts involving design-build, finance, operations, maintenance and transfer covenants. Our team has extensive experience and deep understanding of how to manage the legal, political and commercial complexities of P3s. Our representative projects include:

- Higher ed facilities
- Courthouses and social infrastructure
- Professional sports facilities
- Broadband
- Airport renovation/expansion
- Energy districts
- Water/wastewater facilities
- Transit-based mixed-use development

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